

Solving the Copyright Conundrum

A Teacher's Guide to Copyright Law in Music

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Why Does Copyright Matter?

Music is continually changing in today's society. We are consistently introduced to new genres, new instruments, and new forms of transmission. However, in this digital age, artists and composers are struggling to make a living from their craft. CDs are no longer the mainstream media and streaming music has become the new controversial craze. With falling sales, how can average performers and writers sustain themselves from a career in music? It's simple: they grant rights to their music through a license. By licensing their music, musicians and/or their publishers can collect a fee for usage of their music in performance, recording, or recreation. These rights are granted to them under the United States Copyright Law, and as such they can enforce them so that no one may infringe upon their creation without their permission.

So how does this apply to music educators and what they do in their classrooms? Music educators are always looking for ways to incorporate different styles of music to keep their students entertained and engaged in learning. This ultimately leads educators to become invested in finding or creating versions of music from currently copyrighted repertoire. As an educator, it is imperative that you understand what rights you and your students have to copyrighted music and, when required, legally obtain the rights for the music before utilizing it in your instruction. The worst thing you would want to happen is have an infringement claim laid against you, your school, or anyone else involved with your program because a work used or created in your classroom was not licensed properly. By learning about what the Copyright Law entails and what rights you have to a work, you can better yourself as an educator and ensure that your students will continue to have great music to learn in their classroom.

The Basics of Copyright Law

As a music educator, it is crucial to understand what you can and cannot do with copyrighted music in and out of your classroom. However, Copyright Law can be very confusing. The goal of this guide is to provide you with the necessary knowledge of how the Copyright Law works and how it applies to your educational endeavors in a form that you can easily understand.

Protecting Our Nation's Progress

When the Constitution of the United States was in development, the writers wanted to ensure that progress of the nation's work in science and art continued through the country's existence so that our country could push for advancement of our world. They believed that the best way to accomplish this was to grant those in the fields of science and art rights to their own work. This idea is dictated in the powers of Congress, as the Constitution states that "The Congress shall have power to... promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."¹ This stature led to the development of regulation of intellectual protection, creating what we now know as patents, trademarks, and copyrights.

Development of Copyright

Copyright is defined as "the legal right to be the only one to reproduce, publish, and sell a book, musical recording, etc., for a certain period of time."² A copyright is established once a work is created in full, and does not require official documentation to be valid.³ However, in order for a work to be copyrighted, it must be an original work that is in a fixed and tangible form and contains expression.⁴ This ensures that copyright extends only to those forms of expression that are not ideas, but rather completed works.

¹ U.S. Const. art. 1. sec. 8.

² "Definition of Copyright," Merriam-Webster, accessed April 21, 2016, <http://www.merriam-webster.com/dictionary/copyright>.

³ U.S. Copyright Act, U.S. Code 17 (1976), § 104.

⁴ U.S. Copyright Act, § 102.

As stated in the Constitution, Congress has the power to grant an artist the rights to their work for a set amount of time. This idea has been the center of heated debate on copyright since the Constitution became law in the late 1700s, as law makers and lobbyists have continued to push for longer periods of protection. As of 1998, copyright is granted to an artist for their lifetime, after which the work is protected for 70 years before it is released into the public domain.⁵ This stipulation comes from the Copyright Term Extension Act, which extended the original lifetime + 50 years term set forth in the Copyright Act of 1976. In several cases, you will see that a company holds copyright over a specific work, such as a music publisher owning a piece of music. Although an artist may have originally created a work, they may have established a publishing company for their music or signed a contract that gave their exclusive rights to another publishing company so that they could monetize their work. Even though a company owns the copyright, the “lifetime” term applies to the lifetime of the artist, not the company, guaranteeing that the work is only copyrighted for the limited time period stated in the Constitution.

Exclusive Rights

By receiving copyright protection, the owner of a work is granted six exclusive rights which protect the owner from their work being used without their permission. These six rights give the owner the ability to:

- 1) make copies
- 2) distribute copies
- 3) prepare derivative works (create an arrangement of the work)
- 4) perform publicly
- 5) display publicly
- 6) in the case of sound recordings, the right to perform publicly via digital transmission⁶

⁵ U.S. Copyright Act, § 302.

⁶ U.S. Copyright Act, § 106.

The owner of a copyrighted work may execute these rights as they see fit. In addition, the owner may grant permission to another party to execute one or more of these exclusive rights on their behalf through an agreement called a license. These licenses are usually accompanied by a fee paid to the copyright owner. We will explore these different licenses in depth later on.

In short, copyright was created to ensure that artists would have protection of their work. By having exclusive rights to their material, artists can benefit from their labor without the risk of having someone else take credit for it.

The Legal Repercussions of Copyright

When a person violates one or more of the exclusive rights given to a copyright owner, that person infringes upon the owner's copyright.⁷ Copyright infringement can take multiple forms, such as pirating a film or downloading a picture from the internet without permission. It may seem that these "small" acts of infringement make no impact on the overall profit from a copyrighted work, but that is not the case. In fact, copyright infringement causes the loss over \$58 billion in the United States economy.⁸ These "small" acts don't seem so small anymore.

Copyright infringement is no stranger to the music classroom, although it might not seem like it. One of the most common examples of infringement in the classroom is photocopying sheet music. As teachers, we may think nothing of making copies of a piece of music so that all of our students have access to it. Yet, every photocopy made is a lost sale for the composer of the work. This especially impacts those composers who sell their work outright themselves. For instance, when a choir of 50 singers only purchases 25 copies of work and makes photocopies for the other 25 singers, the composer loses the potential profit from those illegal copies. School budgets can cause issues like this to occur, but if teachers are proactive with their budgeting, we can prevent infringement and continue promoting the creation of new works for our students to learn from.

How Infringement Claims Work

If the owner of a copyrighted work believes that their exclusive rights have been infringed upon, they may proceed with a federal case against the infringing party.⁹ In order to prove that infringement has occurred, the plaintiff must show ownership, unauthorized copying, and unlawful appropriation.¹⁰ To prove

⁷ U.S. Copyright Act, § 501.

⁸ JC Hendrickson, "Intellectual Property Theft: An Economic Antagonist," accessed April 21, 2016, <http://knowledgecenter.csg.org/kc/content/intellectual-property-theft-economic-antagonist>.

⁹ U.S. Copyright Act, § 501.

¹⁰ Christopher C. Collie and Eric D. Gorman, "Digital Sampling of Music and Copyrights: Is it Infringement, Fair Use, or Should We Just Flip A Coin?," *Boston College Intellectual Property & Technology Forum* (2011): 2.

ownership, the plaintiff must produce evidence that shows ownership, such as an original manuscript or a contract signing the rights over to someone else. With unauthorized copying, the plaintiff must show that infringement of the copyrighted work occurred through direct or indirect proof.¹¹ Direct proof is when the defendant admits wrongdoing or an eyewitness testifies that the defendant committed the wrongdoing.¹² Indirect proof is when the plaintiff shows that the defendant had access to the copyrighted work.¹³ Proving unlawful appropriation requires the plaintiff to show that the use of the copyrighted work was substantial and material.¹⁴ The “substantial similarity” standard is typically used to prove substantial and material use, which is met when a typical listener can reasonably recognize the copyrighted work within the infringing work.¹⁵ If a court finds that these three points are met, then the infringement claim can proceed in court.

Defending Yourself

When a defendant is charged with copyright infringement, there are several possible defenses with which to disprove infringement. However, for our purposes, we will discuss six possibilities. These are:

- Statute of limitations: A copyright claim must be submitted within three years of the infringement occurring or the claim may not proceed in court¹⁶
- Abandoned copyright: The copyright owner abandoned their rights to their work
- Independent creation: The defendant created their work without having access to the copyrighted work
- Fair use: The use of the copyrighted work is for purposes such as criticism, comment, news reporting, teaching, scholarship, or research¹⁷

¹¹ Collie and Gorman, “Digital Sampling of Music and Copyrights,” 2.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ *U.S. Copyright Act*, § 507.

¹⁷ *U.S. Copyright Act*, § 107.

- De minimis: The defendant's use of the copyrighted work is not substantial or material per the "substantial similarity" standard¹⁸
- Innocent intent: The defendant committed infringement without knowingly doing so

Although these are possible defenses, this does not mean that any of these defenses will prevent you from being found guilty of infringement. There is one defense that needs additional explanation for the purposes of education: the Fair Use Doctrine.

Fair Use Doctrine

As stated above, the Fair Use Doctrine allows for the use of a copyrighted work for criticism, comment, news reporting, teaching, scholarship, or research without infringing upon copyright.¹⁹ This does include photocopying materials for teaching, but as you may have already noticed from above, there is a catch. In order to determine if the use of a copyrighted work is a fair use, a court will consider one or more of the four following factors:

- 1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes
- 2) The nature of the copyrighted work
- 3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole
- 4) The effect of the use upon the potential market for or value of the copyrighted work²⁰

Although these factors on most occasions will determine fair use, it does not mean that a court could still find a defendant guilty of infringement. In fact, even if a court found three factors to swing in favor of fair use, it is still possible that a court could rule that the use was infringement as the factors are not weighted. Because

¹⁸ Collie and Gorman, "Digital Sampling of Music and Copyrights," 2.

¹⁹ *U.S. Copyright Act*, § 107.

²⁰ Collie and Gorman, "Digital Sampling of Music and Copyrights," 2-3.

of the discrepancies of the Fair Use Doctrine, it is best to make sure that any use is approved by the owner even if it is determined to be fair use.

Remedies for Infringement

If one is found guilty of infringement, there are several remedies that may be prescribed to recover damages caused by the infringement. One or more of these remedies will be applied depending upon the severity of infringement. They are:

- Injunction: the court requires defendant to stop the infringing action²¹
- Impound infringing goods: the court requires the defendant to give all remaining infringing goods to the plaintiff, sell the remaining goods and give the profit to the defendant, or destroy all remaining infringing goods²²
- Pay damages: the court requires the defendant to pay damage fees to the plaintiff²³
- Pay costs and attorney's fees: the court requires the defendant to pay the plaintiff's court costs and attorney's fees of the case²⁴
- Statutory damages and fines (criminal charges): the court requires the defendant to pay a fine or be assigned jail time²⁵

As you now know, copyright infringement claims can cause severe issues to not only the music market, but also to you if you are found guilty of infringement. However, you can prevent infringement if you properly request permission to use a copyrighted work.

²¹ *U.S. Copyright Act*, § 502.

²² *Ibid*, § 503-504.

²³ *Ibid*, § 504.

²⁴ *Ibid*, § 505.

²⁵ *Ibid*, § 506.

How to Properly Use Copyrighted Works

Although the Copyright Law benefits those who create music and other forms of art and science, it can deter others from using it to develop their own thoughts and ideas. As music teachers, we want our students to be creative and express themselves, whether it is through their own interpretations of existing music or creating music of their own. Students will be exposed to copyrighted works in any of these situations. We want to ensure that students can access these works, so it is crucial that as a teacher you obtain permission to use that work. However, finding out how to obtain the proper permission is not so easy.

Identifying Your Use and License

When you set out to use a copyrighted work, you need to identify what you plan to use the work for. To make this decision, you need to evaluate which of the six exclusive rights your use will take advantage of. For example, if you want to make a recording of your ensemble's performance of a song and give it to them as a keepsake, you would be using the exclusive rights to make and distribute copies of a copyrighted work. Therefore, you would want to request permission to use those specific rights. After identifying which rights your use would align with, you need to obtain the proper license that would give you permission to those rights. The major licenses that music educators are as follows:

- Mechanical license: Grants permission to make and distribute audio recordings of a copyrighted work
- Print license: Grants permission to make and distribute sheet music of a copyrighted work
- Arrangement (or derivative work) license: Grants permission to create a new version or rendition of a copyrighted work
- Synchronization (or sync) license: Grants permission to make and distribute a video recording of a copyrighted work

- Performance license: Grants permission to perform a copyrighted work publicly
- Grand rights (or dramatic rights) license: Grants permission to stage a full production or concert production of a copyrighted dramatic work, such as a musical or play

Below is a table of several common uses of copyrighted works that are aligned with their exclusive rights and proper license.

Common Uses of Copyrighted Works and What Exclusive Rights They Align With		
Creating a recording of a piece	Make copies and distribute copies	Mechanical license
Adding a new section of voice parts to an existing choral song	Creating derivative works (arrangement)	Arrangement license
Making photocopies of sheet music	Make copies and distribute copies	Print license
Videotaping a concert	Make copies and distribute copies	Synchronization license
Performing a piece on a concert	Perform publicly	Performance license
Streaming a concert live	Perform publicly	Performance license
Staging a production of a play or musical	All exclusive rights	Dramatic/Grand rights license

Once you have identified the proper license(s) for your use, you can move forward with the process of obtaining the license(s). However, you should make sure that you have addressed any possible use of the copyright work so that you obtain all of the proper licenses. It is always best to cover all of your bases to avoid an infringement claim.

Obtaining Your License

To obtain your license, you first need to find out who the original songwriter(s) of the song are and who their publishing company is. The easiest way to do this is to visit a performing rights organization's website, such as BMI, ASCAP, or SESAC, and search their repertory for the song. Once you find out who the publisher is, you will need to contact their licensing department and request permission for what you wish to use the song for. Typically, written correspondence is best when contacting a publisher. This process varies depending upon the use and the publisher. However, it can take a few days to several weeks to receive a license, so you should be proactive when requesting permission to use a copyrighted work. You can opt to hire a company to obtain specific licenses for you to save yourself the hassle of obtaining proper licenses. However, if you opt to obtain the licenses on your own, you can use the following information on common licenses for music programs to assist you in the process.

Mechanical License

In most occasions, mechanical licenses can be obtained through the Harry Fox Agency's SongFile system without directly contacting the publisher. However, this will only work if you make 2,500 or less copies of the song.²⁶ You can visit www.songfile.com, create an account, and follow the on-screen instructions to submit a request. However, make sure that you have all composer information before proceeding. If you can't find the song you want to record on SongFile or plan on producing more than 2,500 copies, you will need to contact the publisher directly.

Print License

Most print licenses can be obtained through a major sheet music publisher, such as Alfred Publishing or Hal Leonard Corporation. However, you will need to do some research first to make sure you have the correct publisher. Both Alfred and

²⁶ "Songfile," Harry Fox Agency, accessed May 10, 2016, <http://www.songfile.com/>.

Hal Leonard have lists of imprints on their websites that tell you what publishers or artists they control print rights to. If you use one of these companies and have verified the correct publisher, you can submit requests through their websites. On Alfred's website, go to their "Licensing Requests" page, create an account, and fill out the form provided. On Hal Leonard's website, go their "Copyright" page and select the option that best fits your use. If your song does not use a major publisher such as Alfred or Hal Leonard, you will need to contact the publisher directly to request permission.

Arrangement License

There are several ways to obtain an arrangement license depending upon who the publisher is. If your song is published by Alfred, you can follow the process stated above to obtain your license. However, if your song is published by Hal Leonard, you will need to use Tresóna Multimedia to process your request. They offer a system to easily process your request. You can sign up and submit your request at through their website. If your song is published outside of Alfred or Hal Leonard, you will need to contact the publisher directly to request permission. You will also need to have your arranger (if you are using one) to sign the license.

Performance License

In most school performances, you will not need a performance license to perform music. Most performing rights organizations do not issue schools licenses as the use of the music usually can fall under the Fair Use Doctrine. However, if by chance you need a performance license, you would need to contact a performing rights organization such as ASCAP, BMI, or SESAC. These PROs offer blanket licenses that will allow for performances of all of the music in their repertory. If you stream a concert and charge a fee, you will need to make sure your videographer has blanket licenses. A free stream would fall under the Fair Use Doctrine.

Synchronization License

To obtain this license, you will need to contact a publisher directly and

request permission, or hire a company to assist you in obtaining the license. You will also need to have your videographer (if you are using one) to sign the license.

Grand Rights (Dramatic Rights) License

Since these licenses are usually issued for the performance of a musical, you will need to contact the company that controls the rights to the show. These companies include Music Theatre International, Rodgers and Hammerstein, Tams-Witmark, Samuel French, and Theatrical Rights Worldwide, to name a few.

In most cases, all of these licenses will require you to pay a fee for the use. These fees depend upon the use, so make sure to ask the copyright owner if they will charge a fee or not. A sample letter to a publisher is included in Appendix A that you may use as a template to contact publishers.

It's Better to Be Safe than Sorry

As you probably know by now, Copyright Law is tricky and can cause great confusion even if you know it like the back of your hand. However, even if you know only a small portion of the law and can understand its importance, you can make an impact on the licensing process. I hope that this guide has provided you with the necessary information on the Copyright Law to help you in your music classroom and that you will use it in your future endeavors with copyright. The more that we learn about the Copyright Law, the better we can be for our students and our community.

Appendix A

Sample Letter to Publishers

[Date]

To Whom It May Concern:

I would like to request permission to [insert use] of [insert song] by [insert composers]. This request is on behalf of [insert school and group name/class]. The song will be used for [describe use].

Please let me know if you will need more information about the [insert use], if you will need a more formal request to [insert use], or if you will charge a fee. I look forward to hearing from you!

Sincerely,

[Name]

[Organization]

[Contact Information]

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U.S. Constitution, Article I, Section 8.

U.S. Copyright Act. U.S. Code 17 (1976).